Supreme Court, U.S.
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No. 99-264

In The

Supreme Court of the United States

GLENN D. DICKERSON, ET AL.,

Petitioners,

vs.

CITY OF DALLAS, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A VIOLATION OF THE FLSA EXISTED WHERE PETITIONERS WERE EXEMPT FROM OVERTIME COMPENSATION PURSUANT TO SECTION 207(k) OF THE FLSA BECAUSE PETITIONERS MEET THE FOUR-PART DEFINITION SET OUT IN § 553.210(a) AND THUS ARE EMPLOYEES WHO PERFORM FIRE PROTECTION ACTIVITIES.

2. WHETHER A VIOLATION OF THE FLSA EXISTED WHERE PETITIONERS WERE EXEMPT FROM OVERTIME COMPENSATION PURSUANT TO SECTION 207(k) OF THE FLSA BECAUSE PETITIONERS FORM AN INTEGRAL PART OF THE CITY'S FIRE PROTECTION ACTIVITIES AND THUS ARE EMPLOYEES WHO PERFORM FIRE PROTECTION ACTIVITIES.

3. WHETHER A VIOLATION OF THE FLSA EXISTED WHERE PETITIONERS WERE EXEMPT FROM OVERTIME COMPENSATION PURSUANT TO SECTION 207(k) OF THE FLSA BECAUSE PETITIONERS' ACTIVITIES ARE SUBSTANTIALLY RELATED TO FIREFIGHTER ACTIVITIES AND THUS PETITIONERS ARE EMPLOYEES WHO PERFORM FIRE PROTECTION ACTIVITIES, BECAUSE PETITIONERS HAVE RECEIVED TRAINING IN THE RESCUE OF FIRE, CRIME AND ACCIDENT VICTIMS OR OF FIREFIGHTERS OR LAW ENFORCEMENT PERSONNEL INJURED IN THE PERFORMANCE OF THEIR RESPECTIVE DUTIES, AND BECAUSE PETITIONERS ARE REGULARLY DISPATCHED TO FIRES AND ACCIDENTS.

4. WHETHER A VIOLATION OF THE FLSA EXISTED WHERE PETITIONERS' RESPONSE TO EMERGENCY MEDICAL CALLS UNRELATED TO FIRES

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OR ACCIDENTS DID NOT CONSTITUTE NON-EXEMPT ACTIVITIES IN THE CONTEXT OF THE 20 PERCENT RULE AND THUS PETITIONERS WERE NOT REMOVED FROM THE OVERTIME COMPENSATION EXEMPTION PURSUANT TO SECTION 207(k) OF THE FLSA.

PARTIES TO THE PROCEEDING

The following listed persons are parties to this proceeding:

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Lori B. Arent	Petitioner
Luis Arismendez	Petitioner
Troy L. Armstrong	Petitioner
Billy R. Banks	Petitioner
Donald Barton, Jr.	Petitioner
Michael R. Buehler	Petitioner
Vickie Burnett	Petitioner
Fletcher Dahman	Petitioner
Aaron Davis	Petitioner
Glenn D. Dickerson	Petitioner
David Dunnahoo	Petitioner
Deborah Durate	Petitioner
Stephen Fultz	Petitioner
Tod A. Gillam	Petitioner
James Graham	Petitioner
Darryl G. Hayes	Petitioner
Jerome Henry	Petitioner
Randy A. Holmes	Petitioner
Michael Hughes	Petitioner

PARTIES TO THE PROCEEDING – Continued

Gerald Jensen, Jr.	Petitioner
Robert Keaveney	Petitioner
Douglas S. Mallon	Petitioner
Cynthia Manion	Petitioner
Luanne E. Massey	Petitioner
Darrell Maxwell	Petitioner
G.A. McKinney	Petitioner
Paul E. Overton	Petitioner
John Rodriguez	Petitioner
Brent Rogers	Petitioner
Johnny L. Rudder	Petitioner
Richard Santa Cruz	Petitioner
Charles E. Taylor	Petitioner
Thomas A. Taylor, Sr.	Petitioner
J.B. Thompson	Petitioner
Lonnie Tutt	Petitioner
Mark Williamson	Petitioner
Steven Wise	Petitioner
City of Dallas	Respondent

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondent City of Dallas (City) respectfully submits the following brief in response to the brief of Petitioners:

STATUTES, REGULATIONS AND LETTER RULINGS

The following statutes, regulations and United States Department of Labor ("DOL") letter rulings are involved in this case: 29 U.S.C. § 201, et seq. ("Fair Labor Standards Act"), 29 U.S.C. § 207(a), 29 U.S.C. § 207(k), 29 C.F.R. § 553.210, 29 C.F.R. § 553.212, 29 C.F.R. § 553.215, 29 C.F.R. § 553.230, and Department Of Labor, Wage and Hour Division, Letter Ruling (October 9, 1987).

STATEMENT OF THE CASE

As detailed below, there is no cause for this Court's review of this case, which has been rejected by both the District Court ("the district court") and the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"). Petitioners have failed at every level of judicial review to establish a violation by the City of Dallas of § 207(k) of the Fair Labor Standards Act ("FLSA") and have failed to prove that they are employees who are exempt from overtime compensation pursuant to § 207(k).

In their original complaint, Petitioners claim that the City willfully[1] violated the FLSA when it failed to pay them overtime compensation for hours worked in excess of 40 hours per week. (Rec., Vol. I, pp. 1-9). The City asserts that Petitioners are only entitled to partial overtime compensation pursuant to § 207(k) of the FLSA and that at all times, it acted in good faith. (Rec., Vol. I, pp. 14-23).

Respondent states the following facts as material to the summary judgment and the review of this case for this Court's consideration: While Petitioners state that they are "certified paramedics," it is important to note that **all petitioners are also firefighters.** The Dallas Fire Department ("DFD") has no position of employment or rank called "paramedic." (Rec., Vol. III, p. 92). Petitioners are current and former employees of the Dallas Fire Department (DFD) during the period from August 2, 1993, through the present. (Rec., Vol. III, pp. 90-92). During this time, Petitioners were and are certified paramedics and were and are firefighters holding the rank of either fire and rescue officer, which is the entry level rank, or driver engineer, which is one rank above that of fire and rescue officer. (Rec., Vol. III, pp. 92-94; Vol. VIII, pp. 53-55, 96-100).

All fire and rescue officers receive 976 hours of training at the Dallas Fire Academy which teaches skills and use of equipment on topics such as: forcible entry, fire extinguishers, fire service ladders, fire service hoses, fire apparatus, hazardous materials and CPR. (Rec., Vol. VIII,

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[1] The district court held that Petitioners were exempt employees pursuant to § 207(k) of the FLSA and thus did not reach the willfulness issue. (Rec., Vol. IX, pp. 385-406).

pp. 53-55, 57-69). Fire and rescue officers who achieve paramedic certification also receive an additional 794 hours of training at the University of Texas Southwestern Medical School which includes: medical terminology, anatomy and physiology, EKG application, drug administration, infection control, respiratory emergencies, defibrillation, behavioral emergencies, water emergencies, head and neck trauma, burns, triage, and disaster management. (Rec., Vol. VIII, pp. 38-40, 42-51). The DFD cross-trains its fire and rescue officers such that all those employees with paramedic certification are also trained firefighters. (Rec., Vol. VIII, pp. 96-100). No employee spends 100 percent of his work hours as a paramedic. (Rec., Vol. VIII, pp. 96-100).

The DFD employs 744 fire and rescue officers, of which 360 are also certified paramedics and 356 driver engineers, of which 76 are also certified paramedics. (Rec., Vol. VIII, pp. 53-55, 96-100). In fact, the DFD began requiring that all new fire and rescue officers hired must receive paramedic certification so that eventually all firefighters could be paramedics. For purposes of this brief, Respondent will refer to fire and rescue officers and driver engineers who are also certified paramedics as simply, "paramedics."

The DFD operates 55 fire stations, of which 27 have full time mobile intensive care units (MICUs). (Rec., Vol. VIII, pp. 53-55). Paramedics are housed at the fire stations with non-paramedic fire and rescue officers and driver engineers and are under the command of the same station officer. (Rec., Vol. VIII, pp. 96-100). Paramedics and non-paramedic fire and rescue officers and driver engineers are governed by the same DFD policies for hiring, promotion, training and discipline. (Rec., Vol. VIII, pp. 96-100).

Paramedics and non-paramedics work together in the maintenance of the fire station and equipment and train together in continuing education courses. (Rec., Vol. VIII, pp. 96-100). Paramedics are not required to perform any outside work for the City of Dallas or the DFD such as picking up trash, cutting trees, or participating in recycling projects. (Rec., Vol. VIII, pp. 96-100).

Paramedics spend 50 percent of their work hours per pay period, which is two weeks in length, assigned to the crew of a fire apparatus (fire truck or fire engine). (Rec., Vol. VIII, pp. 96-100). Paramedics spend the other 50 percent of their work hours per pay period assigned to the crew of an MICU. (Rec., Vol. VIII, pp. 96-100). This 50/50 paramedic rotation was designed to maintain competency in the performance of both paramedic duties and firefighting duties. (Rec., Vol. VIII, pp. 96-100). A typical work shift is 24 hours, during which time paramedics generally work the entire shift either as an MICU crew member or as a fire apparatus crew member. (Rec., Vol. III, p. 94; Vol. VIII, p. 97).

According to the DFD Manual of Procedures, a fire apparatus and an MICU are dispatched together on all of the following calls: major accidents; heart attacks, unconscious persons; breathing difficulties and other emergencies; and if the ambulance is more than six minutes away from the scene. (Rec., Vol. VIII, pp. 71-94). In addition, fire and rescue officers routinely call paramedics for medical assistance on the scene of an emergency. (Rec., Vol. VIII, pp. 96-100). In situations where the paramedics are the first emergency personnel to arrive at a scene of an automobile accident, they may have to extricate – and have extricated – an injured person from a vehicle to begin treatment and to prepare the injured person for

movement. (Rec., Vol. VIII, pp. 96-100; Vol, IX, pp. 300-301, 324, 339-340). In fact, paramedics are required to carry their firefighting clothes in the MICU in case they must rescue an injured person before beginning patient care. (Rec., Vol. IX, pp. 258-260).

Emergency Medical Services (EMS) dispatch records – those where an MICU was sent out – from August 2, 1993, until February 1, 1997, show that major accidents, heart attacks, unconscious persons, and breathing difficulties accounted for 40.9 percent of all paramedic dispatches. (Rec., Vol. VIII, pp. 102-104, 106). Thus, paramedics and fire and rescue officers were dispatched together on at least 40.9 percent of all EMS dispatches. (Rec., Vol. VIII, p. 102-104). DFD dispatch records from August 2, 1993, until February 1, 1997, show that 57.9 percent of all fire dispatches, those where fire trucks or fire engines were sent out, were to assist an MICU generally, or assist an MICU on a major accident. (Rec., Vol. VIII, pp. 102-104). Thus, paramedics and fire and rescue officers were dispatched together on at least 57.9 percent of all fire dispatches. (Rec., Vol. VIII, pp. 102-104).

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly affirmed the judgment of the district court, and the district court properly granted the City's motion for summary judgment in favor of Respondent, City of Dallas, because no violation of the FLSA existed, since the evidence necessarily established that Petitioners are "employees in fire protection activities" and thus are exempt from overtime compensation pursuant to § 207(k). The summary judgment evidence

proved that Petitioners easily meet the four-part definition of fire protection employees as set out in 29 C.F.R. § 553.210(a) and that they form an integral part of the City's fire protection activities. Additionally, the evidence showed that Petitioners' activities are substantially related to "fire and law enforcement activities" in that they have received training in the rescue of fire, crime and accident victims or of firefighters or law enforcement personnel injured in the performance of their respective duties and are regularly dispatched to fires and accidents, and thus they are fire protection employees pursuant to § 207(k) of the FLSA.

Furthermore, Petitioners failed to present sufficient evidence and binding legal precedent to support their contention that the overtime compensation exemption under § 207(k) is not applicable to them because they spent more than 20 percent of their time in non-exempt activities which they define as medical emergencies other than fires and automobile accidents. The Fifth Circuit correctly affirmed the holding of the district court that Petitioners' definition of non-exempt activities is without merit. Specifically, the Fifth Circuit and the district court correctly held that Petitioners' response to emergency medical calls unrelated to fires or accidents did not constitute non-exempt activities, and thus Petitioners were not removed from the overtime compensation exemption pursuant to § 207(k) of the FLSA.

Clearly, the Fifth Circuit's affirmance of the district court's grant of summary judgment is proper. A careful review of § 207(k), related regulations, case law precedent and the unique facts of this case demonstrates that Petitioners fall within the § 207(k) exemption and are not removed from the exemption by the 20 percent rule. The

City contends that the Fifth Circuit properly affirmed the district court's grant of summary judgment, since no genuine issue of material fact existed as to any claims, and the City was entitled to judgment as a matter of law. Accordingly, the City respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. SUMMARY JUDGMENT: THE APPROPRIATE LEGAL STANDARD

Summary judgment is appropriate in any kind of action

> . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). A motion for summary judgment is proper when pleadings and the record taken as a whole demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In appropriate circumstances, awarding summary judgment is not disfavored in federal court: "[s]ummary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

A party moving for summary judgment need not support his motion with affidavits or other evidence negating the non-movant's claims. Fed.R.Civ.P. 56(a). To withstand a motion for summary judgement, the non-movant must present evidence sufficient to establish the existence of each element of his claim as to which he will have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); and *Topalian v. Ehrman*, 954 F.2d 1125, *reh'g denied*, 961 F.2d 215 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). The threshold inquiry, therefore, is whether there are "any factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251. The substantive law identifies what facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

Once the moving party establishes it is entitled to summary judgment, the burden shifts, and the non-moving party must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e)) (emphasis in original). In other words, summary judgment is mandatory when a party fails to establish the existence of an essential element of his case on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-324; *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988). With the above summary judgment standards in mind, the Fifth Circuit properly affirmed the district court's grant of summary judgment to Respondent and conclusion that Petitioners' evidence was insufficient to establish a material factual dispute. Petitioners presented no new argument in their appeal below, nor do they here.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD IN HOLDING THAT NO VIOLATION OF THE FLSA EXISTED WHERE PETITIONERS WERE ENGAGED IN FIRE PROTECTION ACTIVITIES AND THUS WERE EXEMPT FROM OVERTIME COMPENSATION PURSUANT TO SECTION 207(k) OF THE FLSA.

The Fifth Circuit correctly affirmed the district court's holding that no violation of the FLSA existed because Petitioners are exempt from overtime compensation pursuant to § 207(k) of the FLSA. (Rec., Vol. IX, p. 405). The FLSA mandates that employers must pay their employees overtime compensation for all hours worked in excess of 40 hours per week. 29 U.S.C. § 207(a). Section 207(k) of the FLSA provides a partial exemption to the overtime compensation requirement for "any employee in fire protection activities . . . " and allows employees involved in fire protection activities to work a total of 212 hours during a work period of 28 days before earning overtime compensation. *See* 29 C.F.R. § 553.230(a) (1997); *see also Christian v. City of Gladstone, Mo.*, 108 F.3d 929, 931 (8th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 557, 139 L.Ed.2d 399 (1997). This exemption allows public agencies to use rotating schedules where employees work 24 hours followed by 48 hours off. *Christian*, 108 F.3d at 931.

Section 207(k) does not define "employee in fire protection activities," but the Department of Labor ("DOL") has promulgated regulations which provide a definition. A DOL regulation provides the following four-part definition:

> [T]he term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with the prevention, control or extinguishment of fires, including such incidental non-firefighting functions such as housekeeping, equipment, maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.

29 C.F.R. § 553.210(a) (1997).

In addition to this four-part definition, the regulation states that the term "any employee . . . in fire protection activities" would also include "rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215." 29 C.F.R. § 553.210(a) (1997).

The "integral part" definition refers to § 553.215 which specifically relates to ambulance and rescue service employees. Section 553.215(a) which sets forth the "substantially related" test provides as follows:

> Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by section 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident

> victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

29 C.F.R. § 553.215(a) (1997).

Contrary to Petitioners' assertions, the legislative history

> shows an intent to include paramedic and rescue work that is substantially related to fire protection within the term of "fire protection activities" in § 207(k): "[The statutory exception] is intended to cover those employees directly employed by a public agency who are engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities."

Christian v. City of Gladstone, Mo., 108 F.3d 929, 933 (8th Cir. 1997), *quoting* 120 Cong.Rec. 8598 (1974).

Throughout their brief, Petitioners refer this court to phrases which are indeed true but which are misleading because they are taken out of context. For example, Petitioners argue that § 207(k) does not expressly provide an exemption for emergency medical services workers, such as paramedics. (Brief of Petitioners, pp. 7-8). Petitioners' argument is disingenuous because it blindly and conveniently ignores the DOL regulations interpreting § 207(k). While it is true that § 207(k) only specifically exempts employees in fire protection and law enforcement activities, DOL regulations, as discussed in detail later, provide that employees rendering emergency medical services can be exempt employees pursuant to § 207(k) if they meet the definition of fire protection employees as set forth in the regulations. *See* 29 C.F.R. § 553.210(a) and

§ 553.215(a) (1997). In this case, the Fifth Circuit and the district court correctly found that the evidence necessarily established that Petitioners were exempt employees pursuant to § 207(k) because they satisfied the definition of fire protection employees as set forth in the DOL regulations: (1) the four-part definition as stated in § 553.210(a); (2) the "integral part" definition as stated in § 553.210(a); and (3) the "substantially related" test as stated in § 553.215(a). (Rec., Vol. IX, pp. 393-394, 401).

Throughout their brief, Petitioners contend that the Fifth Circuit and the district court did not "narrowly construe" the § 207(k) exemption because they found that Petitioners were fire protection employees. These contentions are incorrect. The courts below did **not** broaden the § 207(k) exemption in this case, but rather followed the language and spirit of § 207(k) and related regulations and the existing Fifth Circuit precedent in applying the unique facts of this case, where Petitioners are both firefighters and paramedics. Contrary to Petitioners' assertions, given the facts in this case and the cross-training of Petitioners as firefighters and paramedics, there can be no other interpretation but that Petitioners fall "plainly and unmistakably" within the terms and the spirit of the § 207(k) exemption. *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). As discussed below, Petitioners are employees engaged in fire protection activities and thus are exempt employees pursuant to § 207(k).

A. No Violation of the FLSA Existed Where Petitioners Were Exempt from Overtime Compensation Pursuant To Section 207(k) of the FLSA Because Petitioners Meet The Four-Part Definition Set Out in § 553.210(a) and Thus Are Employees Who Perform Fire Protection Activities.

The Fifth Circuit correctly affirmed the district court's holding that Petitioners meet the four-part definition of fire protection employees as set out in § 553.210(a). (Rec., Vol IX, p. 393). *See* § 553.210(a) as stated on page 10 of this brief. Every Plaintiff is or was employed by the DFD, an organized fire department, as a sworn fire and rescue officer, which is the entry level rank, or as a sworn driver engineer, which is one rank above fire and rescue officer. (Rec., Vol. III, pp. 92-94; Vol. VIII, pp. 53-55, 96-100). As fire and rescue officers, Petitioners received 976 hours of training at the Dallas Fire Academy which is well beyond the number of hours of training required for state certification as a firefighter. (Rec., Vol. VIII, pp. 53-55, 57-69). Additionally, Petitioners obtained their paramedic certification after receiving 794 hours of training at the University of Texas Southwestern Medical Center. (Rec., Vol. VIII, pp. 38-40, 42-51). Further, at least half of Petitioners' work hours are spent assigned to the fire apparatus during which they are responsible for the prevention, control, and extinguishment of fires and must perform said activities as necessary. (Rec., Vol. VIII, pp. 96-100). The other half of Petitioners' work hours are spent assigned to the MICU during which they routinely co-respond with a fire apparatus. (Rec., Vol. VIII, pp. 96-100). In fact, Petitioners are required to carry their firefighting clothes in the MICU in case they must rescue an injured person before beginning patient care.

(Rec., Vol. IX, pp. 258-260). In addition, paramedics and firefighters work together in the maintenance of the fire station and equipment and train together in continuing education courses. (Rec., Vol. VIII, pp. 96-100).

Petitioners claim that an employee must actually fight fires or rescue fire or accident victims. (Brief of Petitioners, pp. 12-13). The evidence in this case, as discussed above, establishes that Petitioners not only fight fires (at least during 50 percent of their work hours) but also rescue victims. In addition, Petitioners' claim contradicts the language of the fourth factor set out in 29 C.F.R. § 553.210, and the cases on which Petitioners rely are clearly distinguishable from this case.

Petitioners misstate the holding in *Christian v. City of Gladstone, Mo.*, 108 F.3d 929, 933 (8th Cir. 1997). The statement which Petitioners attribute to the *Christian* Court is actually a citation reference from *Nalley v. Baltimore*, 796 F.Supp. 194, 200 (D.Md. 1992). *See* Petitioners' Brief, p. 12; *Christian*, 108 F.3d at 932, citing *Nalley*, 796 F.Supp. at 200. The *Christian* Court actually held that sworn firefighters who also spend time as paramedics met the four-part test of § 553.210(a) and met the "substantially related" test of § 553.215(a), and that "[p]roviding paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job." *Christian*, 108 F.3d at 932, 932-33, n.2, 934. "These paramedics are employees in fire protection activities under the four-part test in § 553.210(a), and whether they fit within the statutory exception under any alternative test does not therefore need to be considered." *Christian*, 108 F.3d at 932.

Carlson v. Minneapolis, Mn., 925 F.2d 264, 265 (8th Cir. 1991) is distinguishable, because the arson investigators who claimed to be nonexempt pursuant to § 207(k) neither extinguished nor controlled fires. *See Carlson*, 925 F.2d at 265. In *West*, the Fourth Circuit found that the emergency medical technician plaintiffs were generally prohibited from fighting fires and the county had not shown that the EMTs' activities integrally relate to the Fire Department's fire protection activities. *See West v. Anne Arundel County, Md.*, 137 F.3d 752, 757, 760 (4th Cir. 1998). The case at bar is even more compelling that the Petitioners are engaged in fire protection activities, since the paramedics actually fight fires as part of their duties.

Moreover, Petitioners misstate the holding of *Nalley*, 796 F.Supp. 194, to which they cite to support their contention that they must actually fight fires to satisfy the four-part definition. In *Nalley*, the court found that the plaintiffs were prohibited by city procedures from fighting fires and thus did not have the requisite authority to engage in the prevention, control or extinguishment of fires. *Nalley*, 794 F.Supp. at 200. Petitioners, as sworn members of the DFD, not only have authority to engage in but also do engage in the prevention, control or extinguishment of fires. Petitioners easily meet the four-part definition of a fire protection employee as set forth in § 553.210(a) and thus are exempt from overtime compensation pursuant to § 207(k).

B. No Violation of the FLSA Existed Where Petitioners Were Exempt from Overtime Compensation Pursuant to Section 207(k) of the FLSA because Petitioners Form an Integral Part of the City's Fire Protection Activities and Thus Are Employees Who Perform Fire Protection Activities.

The Fifth Circuit correctly affirmed the district court's holding that Petitioners form an integral part of the City's fire protection activities as contemplated by § 553.210(a). (Rec., Vol. IX, pp. 393-394). *See* § 553.210(a) as stated on page 12 of this brief. Petitioners form an integral part of the City's fire protection activities because they spend half of their work hours assigned to the fire apparatus serving as firefighters. (Rec., Vol. VIII, pp. 96-100). Without Petitioners, the DFD would be without firefighters half of the time. In addition, Petitioners comprise almost 50 percent of all the firefighters in the DFD. (Rec., Vol. IX, p. 393).

Petitioners argue that in order to form an integral part of the DFD they must meet the four-part definition set out in § 553.210(a). (Brief of Petitioners, pp. 12-13). Petitioners' contention clearly misstates the regulation. Section 553.210(a) clearly sets forth **two** separate definitions of the term "any employee . . . in fire protection activities," either of which is sufficient to determine whether an employee is engaged in fire protection activities: (1) four-part definition and (2) "integral part" definition. The "integral part" definition in § 553.210(a) is cross-referenced to § 553.215(a) of the regulations. *Christian*, 108 F.3d at 933, n.2. Petitioners' argument is a distinction without a difference, because either way the Court interprets the language of the "integral part" definition, Petitioners form an integral part of the City's fire

protection activities because they are firefighters 50 percent of their work hours and comprise almost 50 percent of all the DFD firefighters and because they meet the four-part definition of fire protection employees (*see* § II(A), *supra*). Accordingly, Petitioners are exempt from overtime compensation pursuant to § 207(k).

C. No Violation of the FLSA Existed Where Petitioners Were Exempt from Overtime Compensation Pursuant to Section 207(k) of the FLSA because Petitioners' Activities Are Substantially Related to Firefighter Activities and Thus Petitioners Are Employees Who Perform Fire Protection Activities.

The Fifth Circuit correctly affirmed the district court's holding that Petitioners' services are substantially related to firefighter activities as described in § 553.215(a). (Rec., Vol. IX, p. 401). *See* § 553.215(a) as stated on pages 10-11 of this brief. The Fifth Circuit correctly applied the "substantially related" test as set forth in § 553.215(a) to employees of a municipal fire department under facts similar to the facts at hand. *Bond v. City of Jackson*, 939 F.2d 285, 287-288 (5th Cir. 1991). The district court's ruling that Petitioners' activities are substantially related to fire and law enforcement activities is consistent with the Fifth Circuit's findings in *Bond*.

In *Bond*, paramedics and emergency medical technicians (EMTs) employed by the City of Jackson, Mississippi alleged that they were not fire protection employees pursuant to § 207(k) and thus the city violated the FLSA by failing to pay them overtime compensation. *Bond*, 939 F.2d at 286. The Fifth Circuit held that the work of the paramedics and EMTs was "substantially related to fire and law enforcement activities" as defined by

§ 553.215(a) because they worked side-by-side with fire-fighters at accident scenes, co-responded with the fire apparatus to some fire and accident scenes and were trained in basic life-saving procedures and life-support procedures. *Bond*, 939 F.2d at 286-288.

The Fifth Circuit referred to a DOL Wage and Hour Division Administrative Letter Ruling in determining whether the Petitioners' activities were substantially related to fire protection activities. *Bond*, 939 F.2d at 287-288. This Letter Ruling elaborates on the application of the "substantially related" test to paramedics. The Letter Ruling states as follows:

> [W]e set forth two tests for determining if the activities of EMTs are "substantially related" to fire protection or law enforcement as described in section 553.215. . . . The first test requires that EMTs be trained to rescue individuals who have been injured or who are in danger of being injured. Under these circumstances, the term "rescue" refers to actions taken to free a victim from imminent danger or harm by the most expeditious means. In many cases, this may require an EMT to take action beyond merely applying emergency medical treatment such as bandaging, administering oxygen, or transporting an individual to a hospital. For instance, there may be situations where the EMTs, as the first responders at the scene of an automobile accident, must extricate an injured person from a vehicle in order to begin treatment and preparation for movement as soon as possible. . . . This means that an EMT must be properly trained to operate special types of equipment, such as hydraulic "spreaders" or chemical foam extinguishers, in case they are available for their

> use at the accident scene. Therefore, we interpret the requirement that an EMT be "trained to rescue" as meaning that the individual has knowledge of basic life-saving procedures and life-support procedures (i.e. CPR, administering oxygen, and extrication techniques). However, it is not necessary for an EMT to routinely perform any or all of these procedures in order to meet the requirements of the first test referred to above.
>
> . . .
>
> The second test to determine if activities are "substantially related" to fire protection or law enforcement is that EMTs must be "regularly dispatched" to such things as fires or accidents. . . . There is no specific frequency of occurrence which establishes "regularity"; it must be determined on the basis of the facts of each case.

DOL, Wage & Hour Div., Ltr.Rul. (Oct. 9, 1987); *see also Bond*, 939 F.2d at 287-88. Further, the DOL's interpretation of its regulations is not "plainly erroneous or inconsistent with the regulation" and can be controlling as long as it complies with the limits of the statute. *Auer v. Robbins*, 117 S.Ct. 905 (1997).

Petitioners disingenuously ignore the DOL regulations (and relevant case law) which require the employees' activities to be "**substantially related**" to fire protection or law enforcement activities in order for the employees to be exempt pursuant to § 207(k). The evidence establishes that Petitioners' activities are substantially related to fire protection or law enforcement activities.

1. The Fifth Circuit Correctly Affirmed the District Court's Grant of Summary Judgment to Respondents because Petitioners Have Received Training in the Rescue of Fire, Crime And Accident Victims or of Firefighters or Law Enforcement Personnel Injured in the Performance of Their Respective Duties.

The Fifth Circuit correctly affirmed the district court's finding that Petitioners are trained in and actually perform rescues of fire, crime and accident victims and of service personnel injured in the course of duty as required by § 553.215(a). (Rec., Vol. IX, p. 395). *See* § 553.215(a) as stated on pages 10-11 of this brief. The facts in this case are more compelling than those presented in *Bond* and in the cases Petitioners cite for support. The *Bond* Petitioners were not cross-trained as firefighters; they did not work 50 percent of their work hours as firefighters; they had different policies and procedures regarding the terms of their employment, including hiring, payroll and promotion than the firefighters; and they had a larger response area than the firefighters. *Bond*, 939 F.2d at 286.

In contrast, Petitioners are cross-trained as both paramedics and firefighters such that they do not spend all of their work hours serving as paramedics or firefighters. (Rec., Vol. VIII, pp. 96-100). Rather, they work 50 percent of each pay period as firefighters and 50 percent of each pay period as paramedics. (Rec., Vol. VIII, pp. 96-100). This rotation of duties was designed to maintain competency in the performance of both paramedic duties and firefighter duties. (Rec., Vol. VIII, p. 97). As a result of the paramedic-firefighter rotation system, Petitioners were trained to, and actually do, rescue individuals who

are injured or who are in danger of being injured. (Rec., Vol. VIII, pp. 96-100; Vol, IX, pp. 300-301, 324, 339-340). In fact, paramedics are required to carry their firefighting clothes in the MICU in case they must rescue an injured person before beginning patient care. (Rec., Vol. IX, pp. 258-260).

As part of the 976 hours of training taught at the Dallas Fire Academy, all fire and rescue officers are trained in skills and equipment such as: forcible entry, fire extinguishers, fire service ladders, fire service hose, fire apparatus, rescue, swift water rescue, trench rescue, confined space rescue, transportation emergencies, hazardous materials, and CPR. (Rec., Vol. VIII, pp. 53-55, 57-69). Additionally, all fire and rescue officers receive training and certification as paramedics. (Rec., Vol. VIII, pp. 38-40, 42-51). Specifically, fire and rescue officers are trained in skills such as: medical terminology, anatomy and physiology, EKG application, drug administration, infection control, respiratory emergencies, defibrillation, behavioral emergencies, water emergencies, head and neck trauma, burns, triage and disaster management, domestic violence, and scene protection/gang violence. (Rec., Vol. VIII, pp. 38-40, 42-51). Thus, Petitioners are not only trained in fire protection, fire suppression and extraction techniques, but also are capable of administering basic life-saving and life support procedures, such as CPR. Rec., Vol. VIII, pp. 38-40, 42-51, 57-69).

Additionally, the DFD operates 55 fire stations, of which 27 have full time mobile intensive care units (MICUs). (Rec., Vol. VIII, pp. 53-55). Paramedics are housed at the fire stations with firefighters and are under the command of the same station officer. (Rec., Vol. VIII, pp. 53-55). Paramedics and firefighters are governed by

the same DFD policies for hiring, promotion, training and discipline, work together in the maintenance of the fire station and equipment and train together in continuing education courses. (Rec., Vol. VIII, pp. 96-100).

Petitioners request this court to "narrowly construe" § 207(k) and the related regulations. (Brief of Petitioners, p. 8). Petitioners, however, satisfy the "substantially related test" because they **actually are trained in rescue and actually use** their training by rescuing fire and accident victims. (Rec., Vol. VIII, pp. 96-100; Vol, IX, pp. 300-301, 324, 339-340). Petitioners, after all, are both paramedics **and** firefighters. (Rec., Vol. VIII, pp. 97). The *O'Neal v. Barrow County Bd. of Commissioners*, 743 F.Supp. 859 (N.D.Ga. 1990), *vacated and remanded*, 980 F.2d 674 (11th Cir. 1993), is distinguishable, because Petitioners are trained to rescue, as is required of all fire and rescue officers, and actually rescue victims in the course of their paramedic duties. (Rec., Vol. VIII, pp. 38-40, 42-51, 57-69, 96-100; Vol, IX, pp. 300-301, 324, 339-340).

In short, the evidence establishes that Petitioners have received the training, have the necessary skills and when necessary, actually use their training and skills to rescue injured individuals, and thus they satisfy the first prong of § 553.215.

2. The Fifth Circuit Correctly Affirmed the District Court's Grant of Summary Judgment because Petitioners Are Regularly Dispatched to Fires and Accidents.

The Fifth Circuit's rulings in *Bond* and in this case are correct. The district court correctly found that Petitioners are regularly dispatched to fires and accidents as required by § 553.215(a). (Rec., Vol. IX, p. 400). *See* § 553.215(a) as

stated on pages 10-11 of this brief. The *Bond* Court found that plaintiffs were "regularly dispatched" where EMS ambulances co-responded with a fire apparatus, 90 percent, and where plaintiffs' testimony showed that they spent most of their time responding to accidents. *Bond*, 939 F.2d at 288. Petitioners' argument that they have "two separate and distinct jobs" is disingenuous. (Brief of Petitioners, p. 15).

In this case, EMS dispatch records – those where an MICU was sent out – from August 2, 1993, until February 1, 1997, show that major accidents, heart attacks, unconscious persons, and breathing difficulties accounted for 40.9 percent of all paramedic dispatches. (Rec., Vol. VIII, pp. 102-104, 106). Thus, paramedics and fire and rescue officers were dispatched together on at least 40.9 percent of all EMS dispatches. (Rec., Vol. VIII, pp. 102-104). DFD dispatch records from August 2, 1993, until February 1, 1997, show that 57.9 percent of all fire dispatches – those where fire trucks or fire engines were sent out – were to assist an MICU, generally, or assist an MICU on a major accident. (Rec., Vol. VIII, pp. 102-104). Thus, paramedics and fire and rescue officers were dispatched together on at least 57.9 percent of all fire dispatches. (Rec., Vol. VIII, pp. 102-104).

Furthermore, a fire apparatus and an MICU are dispatched together on all of the following calls: major accidents; heart attacks, unconscious persons; breathing difficulties and other emergencies; and if the ambulance is more than six minutes away from the scene. (Rec., Vol. VIII, pp. 71-94). Paramedics are also routinely called for medical assistance by fire and rescue officers on the scene of an emergency. (Rec., Vol. VIII, pp. 96-100). In situations where the paramedics are the first emergency personnel

to arrive at a scene of an automobile accident, they may have to extricate – and have extricated – an injured person from a vehicle to begin treatment and to prepare the injured person for movement. (Rec., Vol. VIII, pp. 96-100; Vol, IX, pp. 300-301, 324, 339-340). In fact, paramedics are required to carry their firefighting clothes in the MICU in case they must rescue an injured person before beginning patient care. (Rec., Vol. IX, pp. 258-260). Paramedics are also dispatched with Dallas police officers to the scene of shootings, major accidents, stabbings, aggravated assaults, suicide attempts, disturbances, injuries occurring on City property and drug overdoses. (Rec., Vol. VIII, pp. 98-9).

Most importantly, Petitioners **are** firefighters and spend 100 percent of half of their time working in that capacity. (Rec., Vol. VIII, pp. 96-100). The other half of their time, Petitioners serve as paramedics during which they routinely co-respond with firefighters to accidents and fires; e.g., 40.9 percent of all EMS dispatches involved dispatching both paramedics and fire and rescue officers. (Rec., Vol. VIII, pp. 96-100, 102-104, 106). The evidence necessarily establishes that Petitioners are "regularly dispatched" to fires and accidents when serving as paramedics and thus the second prong of § 553.215(a) is satisfied. The district court correctly held that both prongs of § 553.215(a) are satisfied, and thus Petitioners' services are substantially related to firefighter activities. (Rec., Vol. IX, p. 401).

For the above reasons, no violation of the FLSA existed where Petitioners were engaged in fire protection activities as described in § 553.210(a) and § 553.215(a) and thus were exempt from overtime compensation pursuant

to § 207(k). Accordingly, the Fifth Circuit's affirmance of the district court's judgment is correct.

III. NO VIOLATION OF THE FLSA EXISTED WHERE PETITIONERS' RESPONSE TO EMERGENCY MEDICAL CALLS UNRELATED TO FIRES OR ACCIDENTS DID NOT CONSTITUTE NON-EXEMPT ACTIVITIES IN THE CONTEXT OF THE 20 PERCENT RULE AND THUS PETITIONERS WERE NOT REMOVED FROM THE OVERTIME COMPENSATION EXEMPTION PURSUANT TO SECTION 207(k) OF THE FLSA.

The district court correctly found that the 20 percent rule did not remove Petitioners from the overtime compensation exemption in § 207(k). (Rec., Vol. IX, p. 405). The 20 percent rule or the 80/20 rule, as set forth in § 553.212(a), states that the employer's § 207(k) exemption is lost if employees work more than 20 percent of their time on non-exempt activities. 29 C.F.R. § 553.212(a) (1997). Contrary to Petitioners' assertions, non-exempt activities are not defined in § 553.212 and the only example of these activities provided is work performed by firefighters for forest conservation agencies, such as planting trees. 29 C.F.R. § 553.212(a) (1997). Section 553.212(a) states:

> Employees engaged in fire protection or law enforcement activities as described in Section 553.210 and 553.211, may also engage in some non-exempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies, may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties.

> The performance of such non-exempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the work week or applicable work period. A person who spends more than 20 percent of his/her working time in non-exempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

29 C.F.R. § 553.212(a) (1997).

Petitioners claim that the 20 percent rule takes them out of the § 207(k) exemption because they spent more than 20 percent of their time in non-exempt activities. (Brief of Petitioners, pp. 14-15). Petitioners define non-exempt activities as medical emergencies unrelated to fire protection. (Brief of Petitioners, pp. 5, 14-15).

Petitioners' argument is essentially that only dispatches to fires or major automobile accidents should be included as exempt activities. (Brief of Petitioners, p. 13). None of the cases cited to the Fifth Circuit by Petitioners, however, involved cross-trained paramedics who also serve as firefighters (such as Petitioners). The district court notably and correctly distinguished Petitioners' cases:[2]

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[2] None of these cases involve plaintiffs who were cross-trained as paramedics and firefighters: *Roy v. Lexington County, S.C.*, 141 F.3d 533 (4th Cir. 1998); *Jones v. Columbus, Ga.*, 120 F.3d 248 (11th Cir. 1997); *Wouters v. Martin County, Fla.*, 9 F.3d 924 (11th Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 65, 130 L.Ed.2d 21 (1994); *Justice v. Metropolitan Government of Nashville*, 4 F.3d 1387 (6th Cir. 1993); *Spires v. Ben Hill County, Ga.*, 980 F.2d 683 (11th Cir. 1993); *O'Neal*, 980 F.2d 674; *Nalley*, 796 F.Supp. 194.

> The Court has carefully reviewed all of the cases which Plaintiffs cite and reaches the same conclusion as Defendant: none of these cases involve cross-trained paramedics who also serve in active duty as firefighters. As such, their value as precedent, if any, for this case is limited.

(Rec., Vol. IX, p. 403). The *West* case is likewise distinguishable because the *West* plaintiffs were generally prohibited from fighting fires. *See West*, 137 F.3d at 757.

Petitioners' argument that the Fifth Circuit did not address the 20% limitation of § 553.212(a) is disingenuous (Brief of Petitioners, p. 11), because the Fifth Circuit affirmed the district court's ruling "on the facts as found, the authorities cited, and analysis made by the district court in its comprehensive and thorough order granting the City's motion for summary judgment and denying plaintiffs' motion for partial summary judgment . . . ". The district court clearly ruled on the 20% rule. Petitioners appealed the judgment and the Fifth Circuit affirmed the judgment. *See* Appendix to Petitioners' Brief, pp. 3a and 24a; (Rec., Vol. IX, p. 403). The district court's and Fifth Circuit's approach to the 80/20 rule follows the plain language of § 553.210 and § 553.215 and the only example of non-exempt work given in § 553.212. *See* Appendix to Petitioners' Brief, p. 25a; *see also Christian*, 108 F.3d at 934 ("Providing paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job.") Thus these services should not be considered non-exempt with regard to the 20 percent rule.

In this case, as in *Christian*, Petitioners are cross-trained as firefighters and paramedics. (Rec., Vol. VIII, pp. 96-100). As cross-trained employees, Petitioners are trained to – and actually do – fight fires and provide emergency medical services at fires, as well as on calls not involving fires; albeit they do not do both on the same shift. (Rec., Vol. VIII, pp. 38-40, 42-51, 57-69, 96-100; Vol, IX, pp. 300-301, 324, 339-340). DFD paramedics are required to co-respond with firefighters on certain emergency calls. (Rec., Vol. VIII, pp. 71-94). In fact, paramedics are required to carry their firefighting clothes in the MICU in case they must rescue an injured person before beginning patient care. (Rec., Vol. IX, pp. 258-260). Additionally, firefighters routinely call paramedics for medical assistance on the scene of an emergency. (Rec., Vol. VIII, pp. 96-100). Paramedics are housed at the fire stations with firefighters and are under the command of the same station officer. (Rec., Vol. VIII, pp. 96-100). Paramedics are also dispatched with Dallas police officers to the scene of shootings, major accidents, stabbings, aggravated assaults, suicide attempts, disturbances, injuries occurring on City property and drug overdoses. (Rec., Vol. VIII, pp. 96-100). Paramedics are not required, however, to perform any outside work for the City or the DFD, such as picking up trash, cutting trees or participating in recycling projects. (Rec., Vol. VIII, p. 98).

The holding in *Christian* was based on the nature of services and activities the firefighter/paramedic plaintiffs were engaged in while on-duty. The approach in *Christian* is reasonable when considering the only example of non-exempt activities given in § 553.212 is planting trees; clearly performing life-saving paramedic duties is closer

in substance to fire protection and law enforcement activities than planting trees. *See* Appendix to Petitioners' Brief, p. 25a (Rec., Vol. IX, p. 403). Petitioners spend 100 percent of half of their time serving as firefighters and the other half of their time, serving as paramedics during which they routinely co-respond with firefighters to accidents and fires (40.9 percent of all EMS dispatches involved both paramedics and firefighters) and perform other duties which are substantially related to firefighter activities. (Rec., Vol. VIII, pp. 53-55, 96-100, 102-104, 106). In short, Petitioners spend nearly all of their time on fire protection activities; they frequently co-respond with firefighters and police officers; and their work is substantially related to fire protection activities.

For the above reasons, no violation of the FLSA existed where Petitioners' response to emergency medical calls unrelated to fires or accidents did not constitute non-exempt activities in the context of the 20 percent rule, and thus Petitioners were not removed from the overtime compensation exemption pursuant to § 207(k) of the FLSA. Accordingly, the Fifth Circuit correctly affirmed the district court's judgment.

CONCLUSION

The Fifth Circuit properly affirmed the district court's grant of the City's motion for summary judgment because the evidence necessarily established that the City did not violate the FLSA where Petitioners were employees engaged in fire protection activities and thus exempt from overtime compensation pursuant to § 207(k) of the FLSA. Further, the Fifth Circuit properly affirmed the district court's holding that Petitioners were not

removed from the overtime compensation exemption because their response to emergency medical calls unrelated to fires or accidents did not constitute non-exempt activities with regard to the 20 percent rule. Therefore, the City respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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